T Gopala Krishnan v Datuk Nurjazlan bin Tan Sri Mohamed & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–627 OF 2007
LAU BEE LAN J
28 FEBRUARY 2013

Contract — Formation — Agreement — Whether unrebutted evidence of audio recording of conversation between parties proved existence of agreement — Whether failure to testify of party with whom plaintiff had agreement attracted presumption of adverse inference

The plaintiff's case against the defendants was that they had individually or collectively 'hijacked' and secretly profited from a plan ('the plan') he had devised to acquire a radio licence ('the licence') that was confined for use in East Malaysia, convert it into a federal radio licence and thereafter sell it for a profit. The plaintiff claimed he entered into an oral agreement with the first defendant ('Nurjazlan') whereby the latter would finance the execution of the plan and the profits from the eventual sale of the converted radio licence would be shared between them equally. The first, third and fourth defendants were sons of the second defendant who was Minister of Information at the material time, while the fifth defendant was their family company in which the third and fourth defendants were shareholders cum directors. The plaintiff pleaded that at all material times the second, third and fourth defendants had full knowledge of his agreement with Nurjazlan. In breach of that agreement, the plaintiff alleged that the defendants or any one or more of them entered into a separate agreement with a third party to exploit the licence to the exclusion of the plaintiff and in the process made profits and/or obtained entitlements ('the concealed profits and/or entitlements'). In his instant action the plaintiff sought, inter alia, a declaration that there was a concluded agreement between himself and Nurjazlan; that an account should be rendered of the concealed profits and/or entitlements the defendants had obtained and that he be awarded damages. The plaintiff adduced in evidence a CD of an audio recording he made of his telephone conversation with Nurjazlan when he found he had been excluded from the execution of the plan. Nurjazlan did not testify at the trial. Only the third defendant testified for the defendants whose sole defence was a denial that any agreement as claimed by the plaintiff existed.

Held, allowing the claim:

(1) The plaintiff had proven his claim on balance of probabilities. From the recorded telephone conversation it could be gleaned that the first

defendant: (i) did not deny the existence of the agreement; (ii) confirmed there was a meeting pertaining to the exploitation of the licence; and (iii) did not deny the plaintiff's demand for the concealed profits and/or entitlements. He admitted the plaintiff's entitlement and requested the plaintiff to speak to the second defendant directly (see para 27).

(2) The plaintiff had produced the best evidence through the recording of his telephone conversation with the first defendant. The evidence of the agreement's existence, as supported by the audio recording, remained unrebutted (see para 30).

(3) The third defendant had no personal knowledge about the agreement. As the defence was that Nurjazlan did not enter into an agreement with the plaintiff, the burden lay on the defendants to call the first defendant as a witness to prove the same. It was not for the plaintiff to disprove the purported defence. The non-production of evidence to the contrary attracted the presumption of adverse inference (see para 29).

(4) The third defendant testified that the second defendant was aware of, and in fact was involved in, the plan as he assisted in having the licence converted into a federal radio licence. Given the method the defendants had used in exploiting the licence, which was identical to the plan, the second to fifth defendants had actual knowledge and/or were aware of the existence of the plan and/or the agreement. Hence the defendants had to account to the plaintiff for all the benefits they had derived from their exploitation of the licence with the third party and were liable to pay the plaintiff 50% of the said benefits (see paras 32–33).

[Bahasa Malaysia summary

Kes plaintif terhadap defendan-defendan adalah bahawa mereka secara individu dan kolektif telah 'hijacked' dan mendapat keuntungan secara rahsia daripada suatu pelan ('pelan tersebut') yang telah dirancang olehnya untuk memperoleh lesen radio ('lesen tersebut') yang telah dihadkan penggunaan di Malaysia Timur, mengubahnya kepada lesen radio persekutuan dan kemudian menjualnya untuk keuntungan. Plaintif mendakwa dia telah memasuki satu perjanjian lisan dengan defendan pertama ('Nurjazlan') yang akan membiayai pelaksanaan pelan tersebut dan keuntungan daripada jualan terakhir daripada lesen radio yang telah diubah itu akan dikongsi sama rata antara mereka. Defendan-defendan pertama, ketiga dan keempat adalah anak-anak lelaki defendan kedua yang merupakan Menteri Penerangan pada masa matan, manakala defendan kelima merupakan syarikat keluarga mereka yang mana defendan-defendan ketiga dan keempat adalah pemegang-pemegang saham yang juga pengarah-pengarah. Plaintif mempli bahawa pada setiap masa matan defendan-defendan kedua, ketiga dan keempat mempunyai pengetahuan penuh tentang perjanjiannya dengan Nurjazlan. Dalam pelanggaran perjanjian tersebut, plaintif mengatakan bahawa defendan-defendan atau salah

seorang atau lebih daripada mereka telah memasuki perjanjian berasingan dengan pihak ketiga untuk mengeksploitasi lesen tersebut bagi mengecualikan plaintif dan dalam proses memperoleh keuntungan dan/atau mendapat hak ('keuntungan dan/atau hak tersembunyi tersebut'). Dalam tindakannya ini plaintif memohon, antara lain, satu deklarasi bahawa terdapat perjanjian yang dibuat antaranya dan Nurjazlan; bahawa satu akaun patut diberikan untuk keuntungan dan/atau hak tersembunyi tersebut yang telah diperoleh oleh defendan-defendan dan bahawa dia diawardkan ganti rugi. Plaintif telah mengemukakan keterangan satu CD berhubung rakaman audio yang dibuatnya tentang perbualan telefonnya dengan Nurjazlan apabila dia mendapati dia telah dikecualikan daripada pelaksanaan pelan tersebut. Nurjazlan tidak memberi keterangan semasa perbicaraan. Hanya defendan ketiga memberi keterangan bagi pihak defendan-defendan yang mana satu-satunya pembelaan adalah penafian bahawa wujud apa-apa perjanjian sebagaimana didakwa oleh plaintif.

Diputuskan, membenarkan tuntutan:

(1) Plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian. Berdasarkan rakaman perbualan telefon bolehlah dikatakan bahawa defendan pertama: (i) tidak menafikan kewujudan perjanjian itu; (ii) mengesahkan terdapat satu mesyuarat berkaitan pengeksploitasian lesen-lesen tersebut; dan (iii) tidak menafikan tuntutan plaintif untuk keuntungan dan/atau hak tersembunyi tersebut. Dia mengakui hak plaintif dan meminta plaintif bercakap terus dengan defendan kedua (lihat perenggan 27).

(2) Plaintif telah mengemukakan keterangan terbaik melalui rakaman perbualan telefonnya dengan defendan pertama. Keterangan berhubung perjanjian yang wujud itu, sebagaimana disokong oleh rakaman audio tersebut, masih tidak disangkal (lihat perenggan 30).

(3) Defendan ketiga tiada pengetahuan peribadi tentang perjanjian tersebut. Oleh kerana pembelaan tersebut adalah bahawa Nurjazlan tidak memasuki perjanjian dengan plaintif, beban terletak ke atas defendan-defendan untuk memanggil defendan pertama sebagai saksi untuk membuktikan yang sama. Ia bukan untuk plaintif membuktikan sebaliknya pembelaan yang dimaksudkan itu. Keterangan yang tidak dikemukakan sebaliknya menimbulkan andaian tentang inferens bertentangan (lihat perenggan 29).

(4) Defendan ketiga telah memberi keterangan bahawa defendan kedua menyedari tentang, dan bahkan terlibat dalam, pelan tersebut kerana dia telah membantu dalam mengubah lesen tersebut menjadi lesen radio persekutuan. Berdasarkan cara yang telah digunakan oleh defendan-defendan dalam mengeksploitasikan lesen tersebut yang sama dengan pelan tersebut, defendan-defendan kedua hingga kelima

mempunyai pengetahuan sebenar dan/atau menyedari tentang kewujudan pelan tersebut dan/atau perjanjian tersebut. Justeru defendan-defendan tersebut terpaksa menjelaskan kepada plaintif untuk semua faedah yang telah diperolehi oleh mereka daripada eksploitasi lesen tersebut dengan pihak ketiga dan bertanggungjawab untuk membayar plaintif 50% daripada faedah tersebut (lihat perenggan 32–33).]

Notes

For cases on agreement, see 8(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4609–4631.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors & another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373, HC (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33; [1991] 1 CLJ 9, SC (refd)

How Paik Too v Mohideen [1968] 1 MLJ 51, FC (refd)

Jademall Holdings Sdn Bhd v Lim Tuan [2010] MLJU 257; [2010] 1 LNS 1067, HC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

Karisma Wira (M) Sdn Bhd v Salleh bin Abdul Majid and Anor [2010] MLJU 1282, HC (folld)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Royal Brunei Airlines v Tan Kok Ming Philip [1995] 3 MLJ 74, PC (refd)

Teoh Boay Lan Trading as Chemmex Enterprise v Zambina Wawasan Sdn Bhd [2010] MLJU 1078; [2010] 1 LNS 646, HC (refd)

Warman International Limited & Anor v Brian Dwyer & Ors [1995] 2 CLJ 326, HC (refd)

Legislation referred to

Evidence Act 1950 ss 63, 64, 114(g)

Prem Ramachandran (Andy Tan with him) (Kumar Partnership) for the plaintiff.
Noor Amran bin Abdul Jalil (Irdawati bt Abdul Aziz with him) (Noor Amran) for the defendants.

Lau Bee Lan J:

[1] The plaintiff's claim is for a declaration that there is a concluded

agreement between the plaintiff and the first defendant, an account of the concealed profits and/or entitlements (whereby the defendants and/or any one of them entered into a separate agreement with the *Star* to exploit the radio license to the exclusion of the plaintiff) together with claim for damages (prayers (a)–(e) of the reamended statement of claim dated 18 June 2012.

[2] Essentially, the plaintiff's pleaded case is sometime in 2002, the plaintiff came to know about the availability of a radio license which had been issued to Rimakmur Sdn Bhd confined for use in East Malaysia ('the radio license'). The plaintiff intended to exploit the radio license for profit. The plaintiff then came up with the following plan:

(a) to acquire the radio license from Rimakmur Sdn Bhd and convert the same into a federal radio license; and

(b) thereafter, to sell the said radio license to any interested parties for a substantial profit.

('the plan')

[3] The plaintiff was not well at the material time. Sometime at the end of 2003/2004, the plaintiff reached an agreement with the first defendant to exploit the radio license ('the agreement').

[4] Pursuant to the agreement, it was agreed that:

(a) the plaintiff would make available to the first defendant, the details of the radio license, the plan and the means of having the same acquired and converted for use in West Malaysia;

(b) the first defendant would finance the plan, including the costs of acquiring and converting the radio license;

(c) upon the first defendant procuring the radio license, the first defendant would undertake to have it converted for use in West Malaysia;

(d) the radio license would thereafter be sold to any party interested in acquiring the same; and

(e) the profits gained from the sale of the radio license would be equally divided between the plaintiff and the first defendant.

[5] The plaintiff says that the second, third, and fourth defendants had full knowledge of the existence of the agreement and the terms thereof at the material time and therefore are bound by the agreement.

[6] Notwithstanding the agreement, the defendants and/or any one or more

of them, entered into a separate arrangement with the *Star* to exploit the radio license ('the concealed profits and for entitlements'), to the exclusion of the plaintiff.

[7] The plaintiff's case is that the defendants had breached the agreement. Hence the relief sought by the plaintiff as alluded to in para 1 above.

[8] The defendants' sole defence is that the agreement does not exist and the defendants are not liable to pay the plaintiff any benefits/entitlements which they have gained pursuant to the arrangement/agreement with the *Star*.

THE ISSUES

[9] The principal issues are:

(a) whether there exist the agreement between the plaintiff and the first defendant; and

(b) if so, whether the second to fifth defendants were aware of the agreement.

THE EVIDENCE

[10] The plaintiff, T Gopala Krishnan, who was his own witness ('PW1') testified in examination-in-chief that in 2002 a friend from Sabah, Yusoff Manan contacted him and asked him if he was interested to purchase a radio license that was confined for use in East Malaysia as it was not being used by him and it was scheduled to be invalidated by the government. His plan was to acquire the radio license from Rimakmur SB and convert it into a federal radio license.

[11] He was the one who identified the radio license and invited the first defendant to participate in the deal and in 2002/2003 there were potential buyers, one of whom was Astro. He had contacted the first defendant, Datuk Nur Jazlan because he was his close friend as well as his father, the second defendant, the late Tan Sri Dato Mohamed bin Rahmat who was the Minister of Information at the material time and he had business dealings with them, namely, NESR Sdn Bhd (dealing with housing estate and special filtration) and Malaysian Airborne Agro Sdn Bhd (area fertilising company). He had known the second defendant for more than 40 years prior to his death and the first defendant since he was a kid.

[12] He did not front the acquisition of the radio license for three reasons ie (a) the radio license had to be converted and it would be easier for the first

defendant to apply and secure the conversion without his direct involvement; (b) since Astro was a possible purchaser, it was agreed that it was better he did not surface; and (c) in 2003 he underwent a major heart surgery.

[13] It was agreed between the first defendant and him that the first defendant would finance acquisition and conversion and the first defendant would eventually sell the radio license and they would split the profits. The material terms of the agreement were:

(a) the Plaintiff would make available to the 1st Defendant, the details of the said Radio License and the means of having the same acquired and converted for use in West Malaysia;

(b) the 1st Defendant would finance the entire plan, including the costs of acquiring and converting the said radio license;

(c) upon the 1st Defendant procuring the said radio license, the 1st Defendant would undertake to have it converted for use in West Malaysia;

(d) the said Radio License would thereafter be sold to any party interested in acquiring the same; and

(e) the profits of the resale of the Radio License would be equally divided between the Plaintiff and the 1st Defendant.

[14] Around 2006, he came to know through a friend and after checking himself that:

(a) the first defendant had caused the purchase of the radio license from Rimakmur SB through the fifth defendant;

(b) sometime in February 2003, the radio license was converted to a federal radio license; and

(c) subsequently between 2005 and 2006, the defendants caused the fifth defendant to enter into a share sale agreement with the *Star* wherein the *Star* had acquired 22,400 of 32,000 ordinary RM1 shares in Rimakmur ('the resale agreement').

[15] There was evidence that (a) the fifth defendant was linked to the other defendants in that the third and fourth defendants, Nur Jazman bin Mohamed and Nur Jasni bin Mohamed respectively, were the shareholders and directors of the fifth defendant, TM Rahmat Sdn Bhd based on the company search of the fifth defendant (exh P3, bundle B p 4); and (b) the aforesaid shareholding interest of STAR and the fifth defendant in Rimakmur SB as evident from the company search in Rimakmur SB (exh P4, bundle B p 5).

[16] Pursuant to the agreement, the plaintiff was entitled to 50% of the profits from the proceeds derived from the sale of the radio license to *STAR*

and/or the concealed profits and/or entitlements arising from the conduct of the defendants depriving him of his entitlements from the exploitation of the radio license.

[17] Upon discovering the existence of the resale agreement, he immediately telephoned the first defendant to ask for his share of the proceeds as agreed and there were several telephone conversations and discussion. He remembered the first defendant (a) never denied the agreement or the resale agreement; (b) admitted that he was entitled to part of the proceeds of the resale agreement; (c) however that the money from the proceeds was with his father (the second defendant) and he was asked to get his share of it from his father; and he had recorded one of the said conversations. To this end the plaintiff tendered the original recorder and the tape (exhs P1 and P2 respectively) whilst the audio CD and the transcription of the CD which were objected to by the defendants' counsel was marked as IDP6, bundle C p 4 and IDP5, bundle B Tab 3 respectively).

[18] The plaintiff contacted the father of the first defendant to secure his entitlements who took the position that he knew nothing of the agreement and told him to sort out with the first defendant.

[19] Faced with the denial of his entitlements, the plaintiff instructed his solicitors, M/s Kumar Partnership to issue a letter of demand dated 12 December 2006 to the first defendant (exh P7, bundle C pp 1–2). The first defendant caused his previous solicitors, M/s Soh Hayati & Co to reply denying any knowledge of the agreement and specifically stating he never agreed to acquire the radio license (exh P8, bundle C p 3).

[20] I find the plaintiff remained steadfast throughout the cross-examination as the defendants' counsel sought to discredit him in that his testimony as to the existence of the agreement is baseless. I held otherwise for the reasons addressed below.

[21] DW1 stated in examination-in-chief that the first and the fourth defendants are his brothers whilst the late Tan Sri Dato' Mohamed bin Rahmat was his late father. The plaintiff was known to him and his brothers through his late father and their relationship spanned over a period of ten years. DW1 said neither he nor his late father had business dealing with the plaintiff and also denied that the first defendant had any business dealing with the plaintiff. DW1 stated that he and the defendants would not conduct any business dealing which are done orally. He confirmed he knew Yusoff Manan and Mohd Dinnah as acquaintances.

[22] I did not find DW1 to be a credible witness. In examination-in-chief he maintained:

> (i) [Sekitar 2002-2003] tiada rundingan atau perjanjian untuk mengeksploitasikan sebarang lesen radio … [Ianya] adalah untuk mengaturkan penjualan syarikat Rimakmur yang ketika itu mempunyai lesen radio 'free to air' untuk kawasan Kota Kinabalu Sabah sahaja kepada Astro All Asia Berhad (sebuah syarikat media tempatan), yang dimiliki abang pihak Plaintif iaitu Ananda Krishnan. Cadangan untuk menjual syarikat Rimakmur dengan lesennya akhirnya tidak diteruskan oleh pihak Astro dengan alasan lesen penyiarannya terhad kepada Kota Kinabalu sahaja dan oleh itu tidak menarik kepada pihak Astro.;
>
> (ii) Tiada sebarang rancangan atau cadangan yang wujud atau dipersetujui secara tertulis atau lisan dengan pihak plaintif berkenaan mengeksploitasikan satu lesen radio.;
>
> (iii) Tidak wujud cadangan yang dinyatakan oleh Plaintif yang menjadi asas kepada tuntutan Plaintif di sini. … Namun, cadangan tersebut yang dijalankan dengan Defendan pertama dan Plaintif berakhir apabila pihak Astro tidak meneruskan dengan pembelian syarikat Rimakmur. Tiada hubungan atau persetujuan lanjut berhubung mengeksploitasikan lesen radio tersebut yang wujud selepas itu.

[23] However under cross-examination, the following evidence were elicited:

(a) when it was put to him he had no personal knowledge on whether or not an oral agreement was reached between the first defendant and the plaintiff in respect of the exploitation of the radio license, DW1's response was:

> … [T]he 1st Defendant has informed me there is no such agreement at all pertaining to this question.

(b) when asked whether the first defendant is going to come and inform the court, DW1 said:

> No, 1st Defendant has given me the mandate to answer questions and represent him.

(c) DW1 admitted he was not personally involved in the matter of the exploitation of the radio license between the first defendant and the plaintiff and he 'was made aware subsequently as he is my brother';

(d) DW1 said the first defendant told him that the transaction was around 2002–2003; admitted that (i) the plaintiff was involved; (ii) that the license was only to be used in Sabah and if it was to be used in Malaysia, it had to be converted to a federal license;

(e) when asked what has the first defendant have to do with Rimakmur, DW1 answered:

> Rimakmur was basically granted a license by Datuk Yusoff Manan to operate a radio station in Kota Kinabalu in late 90's. So obviously, he couldn't get the license of the ground and he asked my late father to help him to get the license running. So the relationship included my brother and of course the plaintiff was also there and they started talking about the station or whatever but eventually the deal didn't go through. So the answer to the counsel's question just now is the relationship is through my late father's personal relationship with plaintiff, the vendors and …;

(f) that the DW1's late father's relationship with the plaintiff stretched for more than 50 years when his late father was with Filem Negara and the plaintiff was in RTM;

(g) DW1 having earlier said that none of the defendants had business dealings with the plaintiff, has now admitted that he is aware that the first defendant was a co-director in Malaysia Airborne Agro and vice-chairman of NESR which were companies belonging to the plaintiff;

(h) DW1 stated that the fifth defendant acquired 300,000 shares in Rimakmur by purchasing from Mohd Dinnah and Datuk Yusuff in 2005 after STAR acquired its shareholding in Rimakmur; (ii) he had a shareholders agreement with *Star* to run Rimakmur which is privileged; (iii) agreed that his only asset was the Rimakmur license which was converted in 2005; and

(i) that he had been involved in Rimakmur after he bought his own shares which was not long after STAR bought it.

THE FINDINGS OF THE COURT

Whether there exist the agreement between the plaintiff and the first defendant

Admissibility of the transcript of the audio recording (IDP5) and the CD containing the audio recording (IDP6)

[24] Having perused the evidence of both the plaintiff and the DW1 which I have highlighted above, I accept the plaintiff's oral testimony that the agreement existed between the plaintiff and the first defendant. I find the plaintiff to be a more credible witness than DW1 for the reasons stated in paras 10–23 and the paras stated thereunder.

[25] The defendants only challenged the admissibility of the transcript of the audio recording (IDP5) and the CD containing the audio recording (IDP6). I agree with the submission of the plaintiff that (a) IDP5 is the transcript for P2 (tape) and IDP6 is a CD form of P2; (b) both IDP5 and IDP6 are secondary evidence pursuant to s 63 of the Evidence Act 1950; (c) since P1 and P2 (the original) were produced and marked as exhibits (ie they are primary evidence in accordance with s 64 of the Evidence Act 1950), IDP5 (the transcript of the audio recording) and IDP6 (the CD containing the audio recording) which form the secondary evidence would be admissible in court. Therefore I rule that IDP5 and IDP6 be converted to exhs P5 and P6 respectively.

[26] The relevant parts of contents of P2 and P5 are:

PW1: Have you spoken to your ayah?

D1: Alah … don't ask anymore-lah … please-lah … don't know what else …

PW1: Nephew, nephew … *I did the deal with you*, nephew … not with him. Now he …

D1: … you see ah … but *I don't have the money*.

PW1: *Yah but at least you can tell him that you had a deal going with me … on the licence! I was the one that brought you there to see them and i … I spoke to the … other than … the other guys they, they only told me 'Why don't you take it over?' and I thought 'OK, we are family-lah', so I called you! Ahh?*

D1: You talk to him-lah …

PW1: No. He doesn't want to answer my calls, aahh. I mean, it's not fair-lah. I've also got a family. I also was hoping for this money.

D1: Yeah, you talk to him-lah. I … He's your friend.

PW1: Yahh but you tell him that 'Ayah, I had a deal with Uncle Gopal you know!

D1: Ahh … go and talk with him.

PW1: He … he won't listen. If you … if you tell him, he will listen. He's asking me 'Go and ask your … your … err … what … ask your, your … your … my son, don't ask me. I said 'your son say ask you, you say ask him. Where do … where does it stop?'

D1: Yah … but the problem is the money is with him.

PW1: Doesn't matter-lah but you can tell him 'Look, I think I owe this to Uncle Gopal because we had a deal'. So, at least you … you give him the money also, it's not … it's not good-lah. I mean, I … I'm also in trouble … I need money … aahh

D1: I know … but what can I do? I cannot do anything. If I had the money, I'd give it to you!

PW1: Yah but I think you should … you should tell him, I said 'You know, ayah, you have to give Uncle Gopal money also. Aah … the deal is between me

and you OK … the license went through now who's after me, it's the Rahmat family. To me, that was all. I … that's why I never asked you all letter, nothing. Because why? It is trust. Yes or no? Yes or not … now tell me!

D1: Beyond me-lah … you talk to him-lah … (Emphasis added.)

[27] In my judgment from the aforesaid telephone conversation it can be gleaned that:

(a) the first defendant does not deny the existence of the agreement;

(b) the first defendant confirms that there was a meeting pertaining to the exploitation of the radio license; and

(c) the first defendant does not deny the plaintiff's demand for the concealed profits and for entitlements. Instead, the first defendant admits the plaintiff's entitlement and requested the plaintiff to speak to the second defendant directly.

There is no formal written agreement

[28] The plaintiff testified the agreement is an oral agreement. Given the close relationship between the plaintiff and the first and second defendants and the fact that the first defendant had previous dealings in the plaintiff's companies, in my judgment the plaintiff has proffered a reasonable explanation in that he trusted the defendants and did not find it necessary to put the agreement in writing. In any event the courts uphold oral agreements and judgment was entered based on the oral agreements (see *Jademall Holdings Sdn Bhd v Lim Tuan* [2010] MLJU 257; [2010] 1 LNS 1067; *Teoh Boay Lan Trading as Chemmex Enterprise v Zambina Wawasan Sdn Bhd* [2010] MLJU 1078; [2010] 1 LNS 646).

The defendants' failure to call the first defendant to testify

[29] Based on the evidence-in-chief of DW1 itself and the evidence adduced from DW1 during cross-examination, in my view DW1 has no personal knowledge regarding the agreement. It is the defendants' defence that the first defendant did not enter into the agreement with the plaintiff. The burden lies with the defendants to call the first defendant as a witness to prove the same. It is not for the plaintiff to disprove the purported defence and non-production of the evidence to the contrary attracts the presumption of an adverse inference (*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1) where the Court of Appeal held the failure of the party alleging a fact to produce the witness attracts the invocation of s 114(g)

of the Evidence Act (see *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ 9 (Supreme Court) at p 11 F-I left column to A–C right column).

[30] The plaintiff has produced the best evidence through the telephone recording of the phone conversation he had with the first defendant. Thus the witnesses suggested by the defendants ie the representative of the Ministry of Energy, Water and Communications, Yusuf Manan, Mohd Dinnah and a representative from Astro are unnecessary and cannot be construed adversely against the plaintiff as they are not material witnesses anyway. Hence the evidence of the plaintiff that the agreement exists and which is supported by the telephone conversation in P2 and the transcript of the audio recording (P5) remains unrebutted.

Whether the second to fifth defendants were aware of the agreement

[31] Based on the evidence adduced it is undisputed (i) the third defendant formed the fifth defendant and the third and fourth defendants are shareholders of the fifth defendant; (ii) that the first defendant and the first to fourth defendants' late father were aware of the plan and their late father's involvement in the plan. The plan is the plaintiff intended to exploit the radio license of which had been issued to Rimamakmur for profit:

(a) to acquire the radio license from Rimakmur and convert the same into a federal radio license; and

(b) thereafter, to sell the said radio license to any interested parties for a substantial profit.

[32] DW1 testified that the defendants' late father assisted in converting the radio license to a federal license and due to this he was involved in Rimakmur Sdn Bhd. He was aware of the plaintiff's involvement and of the plan as early as 2002 or 2003.

[33] Given DW1's admission that the second and fifth defendants are siblings and the fifth defendant is a family company, albeit between him and the fourth defendant, and the method which the defendants used in exploiting the radio license is identical to the plan, I agree with the plaintiff's submission that the second to fifth defendants had actual knowledge and/or are aware of the existence of the plan and/or agreement. Hence, I am persuaded by the plaintiff's argument that the defendants are to account to the plaintiff of all the benefits derived from the *Star* transaction and are liable to the plaintiff for 50% of the said benefits.

[34] In this regard I draw support from the principle adopted in *Karisma Wira (M) Sdn Bhd v Salleh bin Abdul Majid and Anor* [2010] MLJU 1282 (cited by the plaintiff) where the plaintiff filed the claim against the first defendant (who was appointed as its director and later joined the second defendant) alleging breach of fiduciary duty and breach of contract and that the breach was abetted by the second defendant. In holding that both the defendants were liable to the plaintiff, the court followed the cases of:

(a) *Royal Brunei Airlines v Tan Kok Ming Philip* [1995] 3 MLJ 74 (Privy Council) that 'a person who dishonestly procures or assists in a breach of trust or fiduciary obligation is liable in equity to make good any resulting loss'; and

(b) *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at p 397 and then in *Warman International Limited & Anor v Brian Dwyer & Ors* [1995] 2 CLJ 326 at p 339 where the High Court of Australia approved the principle 'that a person who knowingly and actively participates in a breach of fiduciary duty is liable to account to the person to whom the duty is owed for any benefit he has received as a result of such participation'.

[35] Further, the court held the plaintiff who has suffered from a breach of fiduciary duty is entitled to the remedy sought ie of an accounting from both the defendants for all sums they have received from the project. The argument that the plaintiff had failed to establish the quantum that could be claimed by them did not bite.

[36] Being mindful that the cases cited above are cases pertaining to the breach of trust or breach of fiduciary duty, nevertheless I am of the view the principle can be extended to the factual circumstances of this case where there has been also a breach and the plaintiff is entitled to have an account of the concealed profits and for entitlements from the defendants.

OTHER MATTERS

[37] The defendants have raised issues in submission which in my judgment, the plaintiff has correctly submitted are not specifically pleaded and are outside the ambit of their defence since the defendants' defence is one of bare denial (pp 40–45 and 37–39 of the amended BOP (bundle A) in respect of the defence of the second to fifth defendants and the first defendant). It is trite law that parties are bound by their pleadings and the court must decide on the party's pleaded case (see *How Paik Too v Mohideen* [1968] 1 MLJ 51; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[38] In the event I err on this point, I shall address these matters which are all devoid of merit.

[39] Firstly, the issue that the defendants did not plead that the information that the plaintiff failed to prove that he had the exclusive information with regard to the radio license. I agree with the plaintiff's submission the defendants' case is not that the information pertaining to the radio license was readily available to all and sundry. Rather the evidence revealed that the defendants admitted the information pertaining to the availability of the radio license was shared between the plaintiff, the first defendant and the first defendant's late father. In any event, the issue that the information pertaining to the radio license was commonly available was never put to the plaintiff during cross-examination (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors & another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639).

[40] Be that as it may, I find that the plaintiff has adduced sufficient evidence to prove that he was instrumental in devising the plan to exploit the radio license which remains unrebutted.

[41] Secondly, the issue that the plaintiff could act/perform the deal without a proxy. The plaintiff chose to act by proxy (through the first defendant) as he had undergone surgery which stands unrebutted.

[42] Thirdly, the issue that the defendants were not involved in the purchase of Rimakmur's share by the *Star*. The plaintiff's case has nothing to do with the *Star* acquiring a 70% interest in Rimakmur. Rather, it is about the defendants having secretly secured a benefit from the radio license through a secret arrangement with the *Star*. It is not disputed that the defendants have now acquired a 30% interest in the radio license. The interest is a result of an arrangement between the defendants and the *Star* and it is undisputed the defendants have benefitted from their agreement with *Star* which entitles the plaintiff to 50% of the concealed profit. In any event as alluded to earlier the evidence adduced showed that the defendants secured profits from a private agreement with the *Star*.

[43] The fourth issue is that the defendants did not agree and/or accept the plaintiff's offer and hence no agreement comes into existence whilst the fifth issue is the plaintiff has failed to prove the telephone recording between the plaintiff and the first defendant and that the first defendant admitted the existence of the agreement. Both these issues are misconceived and I have addressed the same in paras 24–28 above.

THE CONCLUSION

[44] In the circumstances on a balance of probabilities as the court held the

plaintiff has proven his claim, the court allowed the plaintiff's claim in terms of the reamended statement of claim as follows:

(a) a declaration that there exists a concluded agreement between the plaintiff and the first defendant in the terms of the agreement as set out in para 13 of the reamended statement of claim;

(b) a declaration that the second to fourth defendants were aware of the agreement pleaded in para 13 of the reamended statement of claim;

(c) as a consequence of (a) and/or (b) a declaration that the second to fifth defendants and/or anyone of them do provide the plaintiff with an account for the concealed profits and/or entitlements;

(d) as a consequence of (a) and/or (b) a declaration that the first defendant and/or the second to fifth defendants pay the plaintiff 50% of the concealed profits and/or entitlements;

(e) general damages to be assessed by the registrar;

(f) an order that the defendants do pay the plaintiff interest on the sums found due and owing at the rate of 4% (although I did not state it specifically on the date of judgment due to inadvertent oversight, it should be for the period after the orders in prayers (c) and (d) are ascertained till the date of realisation); and

(g) the defendants do pay costs to the plaintiff to be taxed unless otherwise agreed.

Claim allowed.

Reported by Ashok Kumar